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In The

Supreme Court of the United States

DAVID ELLIS,

Petitioner,

v.

BRADLEY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS B. JANNEY III
LAW OFFICE OF
DOUGLAS B. JANNEY III
2002 Richard Jones Road
Suite B-200
Nashville, Tennessee 37215
(615) 742-5900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the court of appeals incorrectly affirmed the dismissal of Petitioner David Ellis' complaint (App. 25a-32a) exclusively under Federal Rule of Civil Procedure 12(b)(6) "for failure to state a claim for relief" (App. 3a) where the complaint plainly exceeded the pleading requirements of Federal Rule of Civil Procedure 8(a) such that this Court should exercise its supervisory authority and reverse the judgment of the court of appeals.

2. Alternatively, whether the court of appeals improperly decided an important and unsettled question of state law itself (App. 1a-3a) where Petitioner Ellis had requested that it certify the question to the Supreme Court of Tennessee and where the district court had acknowledged that the applicable authority was "conflicting" and "split" (App. 7a, 15a) such that this Court should certify the question to the Supreme Court of Tennessee or direct the court of appeals to do so.

PARTIES

The parties to this proceeding are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Ellis ("Ellis") respectfully requests that the Court summarily reverse the June 6, 2008, order of the United States Court of Appeals for the Sixth Circuit or grant a writ of certiorari to review that order. Alternatively, Ellis requests that the Court certify the unsettled question of state law that the court of appeals improperly decided itself to the Supreme Court of Tennessee.

OPINIONS BELOW

The court of appeals' June 6, 2008, unpublished order is attached to this petition at pages 1a-3a. The June 22, 2007, unpublished memorandum opinion and order of the United States District Court for the Eastern District of Tennessee is attached at pages 4a-22a. The court of appeals' September 18, 2008, order denying Ellis' petition for rehearing and suggestion for rehearing en banc is attached at pages 23a-24a.

STATEMENT OF JURISDICTION

The court of appeals entered its order on June 6, 2008. It denied Ellis' timely filed petition for rehearing and suggestion for rehearing en banc by order entered September 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 8(a)(2) provides:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

Federal Rule of Civil Procedure 12(b)(6) provides:

> **(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

INTRODUCTION

This is an employment discrimination case that was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure "for failure to state a claim for relief." (App. 3a). Ellis submits that his complaint plainly stated claims upon which relief could be granted under Rule 8(a)(2) of the Federal Rules of Civil Procedure and this Court's decisions interpreting Rules 8(a)(2) and 12(b)(6). (App. 25a-32a). The holdings of the lower courts conflict with these

decisions and constitute a gross departure from the accepted and usual course of judicial proceedings that calls for an exercise of the Court's supervisory power to prevent a miscarriage of justice.

Additionally, the court of appeals ignored Ellis' requests that it certify an unsettled question of state law to the Tennessee Supreme Court and gave no reason for not addressing those requests, even though the district court had stated in its opinion, "Clearly, the authorities are split." (App. 7a, 15a). Instead, the court of appeals improperly decided the issue for the Tennessee Supreme Court, in violation of important principles of federalism.

For these reasons, Ellis respectfully requests that the Court summarily reverse the judgment of the court of appeals or grant a writ of certiorari to review it. Alternatively, Ellis requests that the Court certify the question of state law that the court of appeals decided to the Tennessee Supreme Court or direct that the court of appeals do so.

STATEMENT OF THE CASE

On December 7, 2006, Ellis filed a complaint in the district court against Respondent Bradley County, Tennessee ("the county"), alleging violations of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* ("FMLA"), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"), the Tennessee Human Rights Act, Tenn. Code Ann.

§ 4-21-101, *et seq.* ("THRA"), the Tennessee Handicap Act, Tenn. Code Ann. § 8-50-103 ("THA"), and Tennessee law. (App. 26a). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a).

In his complaint Ellis made the following allegations, among others:

> For his Complaint against Defendant Bradley County, Tennessee ("Defendant"), Plaintiff David Ellis ("Plaintiff") states:
>
> 1. Plaintiff is a citizen and resident of Cleveland, Tennessee, and a former employee of Defendant.
>
> * * *
>
> 6. Plaintiff served as Administrator of Elections for Defendant's Election Commission from 1984 until Defendant fired him on October 6, 2006.
>
> * * *
>
> 10. Defendant is a covered employer under the FMLA.
>
> * * *
>
> 12. In April 2006 Plaintiff sought FMLA leave from Defendant for a serious health condition.
>
> 13. Defendant approved and granted Plaintiff's request for FMLA leave.
>
> 14. On or about June 13, 2006, Plaintiff returned to work prepared and able to perform his job.

15. Plaintiff provided Defendant a letter from his physician releasing him to return to work in his job position.

16. Defendant failed and refused to reinstate Plaintiff to the job position that he held before he exercised FMLA rights or to an equivalent position, in violation of the FMLA.

17. Defendant interfered with Plaintiff's exercise of FMLA rights.

18. Defendant retaliated against Plaintiff for exercising FMLA rights.

* * *

20. Defendant was aware that Plaintiff has Crohn's Disease.

21. As a result of this condition, Plaintiff is substantially limited in one or more major life activities or, alternatively, Defendant regarded him as such.

22. Plaintiff was otherwise qualified to perform the essential functions of his job for Defendant, with or without reasonable accommodation.

23. Defendant failed and refused to reasonably accommodate Plaintiff's disability or perceived disability.

24. Defendant failed to engage in an interactive process with Plaintiff designed to identify reasonable accommodations of his disability or perceived disability.

25. After he attempted to return to work, Defendant refused to communicate with Plaintiff about the status of his job.

26. Defendant replaced Plaintiff with a non-disabled individual or an individual whom it did not regard as disabled.

27. Following his unsuccessful attempt to return to work, Plaintiff complained about, opposed and reported FMLA violations and disability discrimination to Defendant and requested reasonable accommodation.

28. After Plaintiff opposed illegal conduct, Defendant purportedly "reinstated" Plaintiff to his job position on August 4, 2006, but also immediately "suspended" him.

29. Defendant subsequently fired Plaintiff on October 6, 2006.

30. Plaintiff's opposing illegal activity was a substantial motivating factor in Defendant's decision to fire him.

31. Defendant treated Plaintiff differently and less favorably in the terms, conditions, privileges, and benefits of employment than it treated employees who did not engage in legally protected activity and who were not disabled or regarded as disabled.

32. Defendant subjected Plaintiff to adverse employment action based on Plaintiff's engaging in protected activity and/or

his disability or Defendant's perception that he was disabled.

* * *

35. Defendant discriminated and retaliated against Plaintiff in violation of the FMLA, the ADA, the THRA, the THA, and Tennessee law.

* * *

(App. 25a-30a).

On March 13, 2007, the county filed a motion to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (C.A. App. 17). The county asserted that Ellis' complaint "failed to state a claim" under Rule 12(b)(6) "because [Ellis] was an employee of the State of Tennessee" and "because Bradley County was not [Ellis]'s employer." (C.A. App. 17, 23, 61). The county's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction was directed at hypothetical claims against the State of Tennessee, which Ellis had not asserted in his complaint. (C.A. App. 22-23, 61).[1]

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[1] In the Sixth Circuit states enjoy *Eleventh Amendment* sovereign immunity from private suits for damages brought under the self-care provision of the FMLA. *Touvell v. Ohio Dept. of Mental Retardation and Dev. Disabilities*, 422 F.3d 392, 400 (6th Cir. 2005), *cert. denied*. States are likewise immune from such suits under Title I of the ADA. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

On March 19, 2007, Ellis filed a response to the county's motion to dismiss. (C.A. App. 51). He attached documents showing that he received his paychecks from "Bradley County, Tennessee, Cleveland, Tennessee 37364-1167"; that he received life and health insurance and retirement benefits from the county, not the State of Tennessee; and that the county represented to the United States Internal Revenue Service on his 2005 Form W-2 Wage and Tax Statement that it – not the State of Tennessee – was his employer. (C.A. App. 54-56).

On June 22, 2007, the district court entered a memorandum opinion and an order granting the county's Rule 12(b)(6) motion to dismiss Ellis' complaint for failure to state a claim for relief. (App. 21a). The district court declined to address the county's arguments under Rule 12(b)(1). (App. 19a). The district court took judicial notice of the income and benefits documents that Ellis had received from the county and filed with his response to the motion. (App. 15a; C.A. App. 54-56).

On appeal Ellis requested that the court of appeals reverse the judgment of the district court or, alternatively, certify the question of whether he was a county or state employee to the Tennessee Supreme Court. (C.A. Appellant's Brief at 10, 23-24; Pet. for Reh'g at 3, 8-9, 15). The court of appeals affirmed the judgment of the district court dismissing Ellis' complaint "for failure to state a claim for relief" by order entered June 6, 2008. (App. 1a-3a). Ellis timely filed a petition for rehearing and suggestion for rehearing en

banc, which the court of appeals denied by order entered September 18, 2008. (App. 23a-24a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Sanctioned Such A Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Court's Supervisory Power and Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of This Court

The court of appeals' sole basis for affirming the judgment of the district court was, "Because Bradley County was not the proper defendant, Ellis's complaint was subject to dismissal for failure to state a claim for relief." (App. 3a). This holding constitutes a gross departure from the accepted and usual course of judicial proceedings that calls for an exercise of the Court's supervisory power.

In looking at Ellis' complaint the Court can see that it should not have been dismissed "for failure to state a claim for relief" because it met the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. (App. 25a-31a). Rule 8(a)(2) provides:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain . . . (2) a

> short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 8(a)(2).

Ellis' complaint met these requirements. It contained allegations that the county was his employer and that the county was responsible for all of the unlawful conduct pleaded in it. Its dismissal "for failure to state a claim for relief" was a severe deviation from the normal course of judicial proceedings under the Federal Rules of Civil Procedure.[2] Accordingly, the Court should summarily reverse the judgment of the court of appeals.

The court of appeals decided what this Court deems an important federal question in a way that conflicts with the Court's decisions in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) and *Erickson v. Pardus*, ___ U.S. ___, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam). These decisions address motions to dismiss under Rule 12(b)(6), which is the only rule under which this case was dismissed.

In *Swierkiewicz*, the Court held that "the ordinary rules for assessing the sufficiency of a complaint apply" in employment discrimination cases like this one. *Swierkiewicz*, 534 U.S. at 511. The Court stated

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[2] The district court did not "convert" the county's motion to dismiss to a motion for summary judgment; it analyzed and dismissed Ellis' complaint exclusively under Rule 12(b)(6). (App. 6a-7a).

that "'the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). The Court analyzed Rule 8(a)(2), "which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id.* at 512 (quoting Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). The Court observed, "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* "Complaints in [employment discrimination] cases, as in most others, must satisfy only the simple requirements of Rule 8(a)." *Id.* at 513. The Court elaborated:

> Given the Federal Rules' simplified standard for pleading, "a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56.

Id. at 514 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)).

Similarly, in *Erickson* the Court reversed the Tenth Circuit's judgment affirming the district court's dismissal of the plaintiff's complaint, stating, "The holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we . . . vacate the court's judgment and remand the case for further consideration." *Erickson*, 127 S. Ct. at 2198. The Court reiterated, "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 2200 (quoting *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)).[3] The Court stated, "In addition, when ruling on a defendant's motion to dismiss, a judge must accept as

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[3] In *Twombly*, the Court did not change the fundamental "notice" pleading requirements of Rule 8(a)(2). The Court held that, although a complaint need not contain "detailed factual allegations," its allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. at 1964-65. The Court observed that Rule 8(a)(2) requires a "showing" that the plaintiff is entitled to relief and that this threshold is not met with "blanket assertion[s]." *Id.* at n. 3. "A plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65. "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965.

true all of the factual allegations contained in the complaint." *Id.*

Respectfully, the lower courts did not follow Rule 8(a)(2) or the Court's decisions in *Swierkiewicz* and *Erickson*. They overlooked or misapprehended the fact that Ellis satisfied the notice pleading requirements of Rule 8(a). The complaint was dismissed exclusively on a basis that was plainly untrue. Ellis' complaint stated claims for relief. (App. 25a-32a).

Ellis also submitted documents supporting his claims, including paychecks from "Bradley County, Tennessee, Cleveland, Tennessee 37364-1167"; documents showing that he received life and health insurance and retirement benefits from the county, not the State of Tennessee; and his 2005 Form W-2 Wage and Tax Statement on which the county represented to the United States Internal Revenue Service that it – not the State of Tennessee – was his employer. (App. 15a; C.A. App. 54-56).[4] Thus, it was far from clear that no relief could be granted consistent with the facts pleaded in the complaint and dismissal was improper.

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[4] In evaluating a motion to dismiss, "[i]n addition to the allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005).

Ellis was entitled to obtain additional evidence to develop his claims rather than having them dismissed under Rule 12(b)(6) on what the district court acknowledged to be "conflicting" and uncertain grounds. (App. 7a, 15). For example, with his petition for rehearing in the court of appeals, Ellis submitted the Affidavit of Brook K. Thompson, the Tennessee State Coordinator of Elections, demonstrating that, had he been permitted to proceed on his complaint as he was entitled to do, he would have been able to offer further evidence to support his claim that he was a county employee. (App. 37a-43a). Although such evidence was not necessary to withstand the county's Rule 12(b)(6) motion, this affidavit from Tennessee's highest administrative election officer itself establishes a genuine issue of material fact as to whether county election administrators such as Ellis are county employees, if it does not conclusively establish Ellis' claim.[5] Thus, the dismissal of the complaint was improper.

Ellis stated claims for relief under Rule 8(a) sufficient to withstand a motion to dismiss under Rule 12(b)(6). *Swierkiewicz*, 534 U.S. at 512; *Erickson*, 127 S. Ct. at 2200. The court of appeals' judgment is in sharp conflict with Rule 8(a)(2) and

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[5] Ellis should also have been permitted to develop evidence on the issue of whether the county could be deemed an "integrated" or "joint" employer. *See Grace v. USCAR*, 521 F.3d 655, 663-75 (6th Cir. 2008) (FMLA case setting forth factual elements of integrated and joint employer tests).

binding decisions of this Court and will result in a miscarriage of justice if permitted to stand. Accordingly, as it did in *Erickson*, the Court should reverse the judgment of the court of appeals.

II. The Court of Appeals Improperly Decided An Important and Unsettled Question of State Law Itself, Ignored Ellis' Requests that It Certify the Question to the Tennessee Supreme Court, and Gave No Reason for Not Certifying the Question

In ruling on the county's Rule 12(b)(6) motion, it was not proper for the lower courts to pass on the unsettled issue of whether Ellis was a county employee as he alleged in his complaint due to the factual questions inherent in that issue and the notice pleading requirements of Rule 8(a). Nevertheless, the court of appeals decided that Ellis was not a county employee but a state employee. (App. 1a-3a). And it did so despite the district court's acknowledgements in its opinion that "[t]here is conflicting authority" on the issue and, "Clearly, the authorities are split." (App. 7a, 15a).

There is abundant authority supporting Ellis' claim that he was a county employee. Ellis directed the district court and the court of appeals to several state statutory provisions under which he was entitled to develop evidence, including Tenn. Code Ann. § 2-12-210 ("Nothing in Acts 1986, ch. 930 shall be construed as conferring upon any county election commission, administrator of elections or any other

county election official, status as a state employee. All such persons shall be subject to all applicable purchasing and budgetary laws of such county.").[6] He also directed the lower courts to case law supporting his position, including *Cooper v. State of Tennessee*, 106 S.W.3d 688, 690-91 (Tenn. Ct. App. 2003), *perm. app. denied* (holding that Sheriff of Bradley County, Tennessee, was employee of county and not state) and *Spurlock v. Sumner County*, 42 S.W.3d 75, 79 (Tenn. 2001) (holding on question certified from district

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[6] Ellis also pointed to Tenn. Code Ann. § 2-12-201(a)-(b) (county election commission shall "appoint" or "employ an administrator"); § 2-10-202(c) (registrars and administrators "shall perform the duties imposed by this title and duties assigned them by the county election commission."); § 2-12-203 (administrator's "compensation may be increased by resolution of the county legislative body."); § 2-12-208(b) ("[n]othing in this section shall be construed as prohibiting a county from paying its administrator more than the minimum salary provided by this section."); § 2-12-209(c)(2)(A)-(B) and (c)(3) ("If a county election commission is of the opinion that the county legislative body has not appropriated an [appropriate] amount of funds," it shall notify "[t]he county mayor" and "shall be authorized to seek a writ of mandamus to compel the county legislative body to comply with the provisions of this subsection (c)."); § 2-12-109(a) ("it is the responsibility of the county to fund the operations of its election commission."); § 2-12-201(a) (setting forth largely local duties of county election administrator); § 8-17-102(a)(2) (addressing ethical standards for public employees and stating, "for the purpose of this chapter, the county election commission shall be considered an instrumentality of county government; and the administrator of elections and other employees of the election commission shall be considered county employees. . . .").

court that sheriff was county official under Tennessee law).[7]

Because the district court had determined that the applicable authority was "conflicting" and "split," Ellis asked the court of appeals to certify the question to the Tennessee Supreme Court:

> In light of the facts pleaded, evidence presented and accepted, and substantial statutory and decisional authority indicating that Ellis was a county employee, the district court should have certified the question to the Tennessee Supreme Court under Rule 23 of that court. The district court erred in dismissing Ellis' claims without doing so. Accordingly, Ellis respectfully requests that, if the Court does not reverse the judgment of the district court dismissing Ellis' complaint for failure to state a claim under Rule 12(b)(6), the Court certify the question of whether Ellis was a county or state employee to the Tennessee Supreme Court. *See Haley v. Univ. of Tennessee*, 188 S.W.3d 518, 521-22 (Tenn. 2006) (discussing certification of questions from federal courts).

(C.A. Appellant's Brief at 23-24; Pet. for Reh'g at 3, 8-9, 15). Additionally, six months before the court of

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[7] Ellis also pointed to *Durham v. Dismukes*, 333 S.W.2d 935 (Tenn. 1960), *Stambaugh v. Price*, 532 S.W.2d 929 (Tenn. 1976), *Pharris v. Looper*, 6 F.Supp. 2d 720 (M.D. Tenn. 1998), and other cases holding that the employees at issue were county employees.

appeals rendered its decision, Ellis filed a Fed. R. App. P. 28(j) letter containing proposed legislation of the Tennessee Legislature. (App. 33a-36a).[8] The proposed legislation, which was not enacted, stated that Tenn. Code Ann. § 2-12-209 would be "amended by deleting the section in its entirety and substituting instead" the following:

> The state shall be responsible for paying the compensation of all certified administrators of elections and all other employees of the county election commission. Beginning July 1, 2007, all employees of the county election commission shall be deemed state employees for the purposes of insurance, workers' compensation leave, all benefit programs, retirement, compensation increases or other related matters. Any period of service as an employee of the county working for the county election commission as a full-time employee shall be creditable service under the Tennessee consolidated retirement system.

(App. 33a-36a).

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[8] Rule 28(j) provides, "If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited." Fed. R. App. P. 28(j).

As the legislation was not enacted (App. 41a-42a), county election administrators remain county employees and continue to receive benefits from the county rather than through the Tennessee consolidated retirement system as do state employees. Even if the legislation had been enacted, it would not have taken effect until July 1, 2007. (App. 35a). Ellis was discharged by the county – not the State of Tennessee – on October 6, 2006. (App. 26a, 29a, 42a-43a). Thus, at a minimum, the court of appeals should have certified the admittedly unsettled and important question of whether Ellis was a county or state employee to the Tennessee Supreme Court. *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 75-79 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).

The court of appeals ignored Ellis' requests for certification and did not offer any reason for not certifying the question to the state supreme court. (App. 1a-3a). Instead, it improperly decided the issue for that court, in violation of important principles of federalism relating to the relationship between federal and state courts. Accordingly, as an alternative to reversal, the Court should certify the unsettled question of whether Ellis was a county or state employee to the Supreme Court of Tennessee or direct that the court of appeals do so.

CONCLUSION

For the above reasons, Ellis respectfully requests that the Court summarily reverse the judgment of the court of appeals or grant a writ of certiorari to review it. Alternatively, Ellis requests that the Court certify the unsettled question of state law that the court of appeals decided itself to the Supreme Court of Tennessee, or direct the court of appeals to do so.

Respectfully submitted,

DOUGLAS B. JANNEY III
LAW OFFICE OF
DOUGLAS B. JANNEY III
2002 Richard Jones Road
Suite B-200
Nashville, Tennessee 37215
(615) 742-5900

Counsel for Petitioner

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-5929

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ELLIS, Plaintiff-Appellant, v. BRADLEY COUNTY, TENNESSEE, Defendant-Appellee.	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) EASTERN DISTRICT) OF TENNESSEE

ORDER

(Filed Jun. 6, 2008)

Before: MARTIN, GRIFFIN, and GIBSON, Circuit Judges.*

The district court dismissed the complaint in this case because David Ellis sued Bradley County, Tennessee rather than the State of Tennessee, his employer. We affirm.

The original complaint alleged discrimination under the federal Family and Medical Leave Act, 29 U.S.C. §§ 2601-54; the federal Americans with

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* The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Disabilities Act, 42 U.S.C. §§12101-213; the Tennessee Human Rights Act, Tenn. Code Ann. §§421-101-604; and the Tennessee Handicap Act, Tenn. Code Ann. §§8-50-103-901.

Ellis was the Administrator of Elections for the Bradley County Election Commission. In the complaint he alleged that he sought leave "for a serious health condition" in April 2006 and his request was approved by Bradley County. However, when Ellis returned to work on June 13, 2006, Bradley County "refused to reinstate [him] to the job position that he held before. He also claims other medical problems and that the county refused to accommodate him.

The district court dismissed Ellis's complaint under Rule 12b(1)&(6) after "examining the Tennessee Code, relevant case law, and the persuasive Attorney General opinions," the district court concluded that Ellis was an employee of the State of Tennessee rather than Bradley County. Ellis's salary, life and health insurance, and retirement benefits were paid by Bradley County, the minimum amount of his salary was determined by state law. *See* Tenn. Code Ann. § 2-12-208. The statutes provide that a portion of an administrator's salary will be paid by the state if the administrator passes "a written examination on election laws" and, consequently becomes certified by the state election commission, which apparently Ellis was. Tenn. Code Ann. §§ 2-11-202(b), 2-12-209.

Ellis's duties "were not owed to the county alone." *See* Tenn. Code Ann. § 2-12-201(a)(9) and (12). Ellis was associated with the Bradley County Election Commission, whose membership was controlled by the state election commission. *See* Tenn. Code Ann. § 2-12-101. Because the Bradley County Election Commission members are hired, fired, and disciplined by the state election commission, Bradley County did not have the authority to hire, fire, or discipline Ellis. *See id.* Ellis's duties were defined by state law. *See* Tenn. Code Ann. § 2-12-201.

Read in context, the statutes to which Ellis refers to support his argument that he was a county, rather than a state, employee do not apply. *See* Tenn. Code Ann. § 2-12-210; Tenn. Code Ann. § 8-17-102(a)(2). Under these circumstances, Ellis was for all intents and purposes an employee of the State of Tennessee rather than Bradley County. Indeed, the Tennessee Supreme Court has determined that a county election commission "is not an arm of the county government." *Abercrombie v. City of Chattanooga,* 313 S.W.2d 256, 258 (Tenn. 1958). Because Bradley County was not the proper defendant, Ellis's complaint was subject to dismissal for failure to state a claim for relief.

Judgment affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

DAVID ELLIS, Plaintiff, v. BRADLEY COUNTY, TENNESSEE, Defendant.	)	Case No. 1:06-CV-260 Chief Judge Curtis L. Collier

MEMORANDUM

(Filed Jun. 22, 2007)

This matter is before the Court on the motion to dismiss filed by defendant Bradley County ("Defendant") (Court File No. 10), with supporting memorandum (File No. 12). Plaintiff David Ellis ("Plaintiff") timely responded (File No. 13). Defendant replied on March 22, 2007 (File No. 14). Defendant argues Plaintiff's employment discrimination and retaliatory firing complaint should be dismissed because Defendant was not Plaintiff's employer. Rather, Defendant asserrs [sic] Plaintiff was an employee of the State of Tennessee and therefore the State is liable for any illegal employment actions. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4). The Court agrees with Defendant's construction of the applicable statutes and cases, and will **GRANT** Defendant's motion (File No. 10).

I. FACTS

Plaintiff filed this suit on December 7, 2006 (File No. 1). The complaint alleges Defendant first impermissibly refused to accommodate Plaintiff and then terminated Plaintiff because of his medical needs. The following fact summary is drawn from the complaint (File No. 1):

Plaintiff was employed as Administrator of Elections ("Administrator") by Defendant's Election Commission. Defendant is covered by the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* Plaintiff was entitled to, requested, and took FMLA leave in April 2006. When Plaintiff returned to work in June 2006 pursuant to a doctor's release, Defendant refused to reinstate him to his former position (*id.* at ¶¶ 6-18). Plaintiff also suffers from Crohn's Disease. He is otherwise qualified for the Administrator position, but is disabled and requires reasonable accommodation. Defendant allegedly refused to accommodate him. Defendant replaced Plaintiff with a non-disabled individual (*id.* at ¶¶ 19-26).

Plaintiff claims to have complained of and opposed Defendant's discriminatory acts and to have properly requested accommodation. Defendant purportedly reinstated Plaintiff to his position, but then immediately suspended him. Plaintiff was officially terminated on October 6, 2006. Plaintiff alleges his opposition to Defendant's discriminatory practices

was a substantial factor in Defendant's decision to terminate him (*id.* at ¶¶ 27-30).

The complaint alleges additional claims of differential treatment, adverse employment action, and violations of the Tennessee Human Rights Act, the Tennessee Handicap Act, and other State laws (*id.* at ¶¶ 31, 32, 35). Finally, the complaint alleges Defendant violated the requirements of the Tennessee Open Meetings Act, Tenn. Code Ann. § 8-44-101, *et seq.* (*id.* at ¶ 37). Plaintiff requests compensatory damages, reinstatement or front pay, liquidated damages, punitive damages, attorneys' fees, and interest (*id.* at § IV).

II. APPLICABLE LAW

A. Standard of Review

If subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the party asserting jurisdiction bears the burden of establishing it, *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990), and of sufficiently pleading each element of Article III standing to support federal subject matter jurisdiction, *Courtney v. Smith,* 297 F.3d 455, 459 (6th Cir. 2002). Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed if it fails to state a claim for which relief may be granted. In evaluating the complaint pursuant to a 12(b)(6) motion, the Court must accept the complaint's allegations as true and must construe it in the plaintiff's favor. *Hishon v. King & Spalding LLP,* 467 U.S. 69,

73 (1984); *Trzebuckowski v. City of Cleveland,* 319 F.3d 853, 855 (6th Cir. 2003); *Saglioccolo v. Eagle Ins. Co.,* 112 F.3d 226, 228 (6th Cir. 1997). A complaint will not be dismissed unless the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* ___ U.S. ___, 127 S. Ct. 1955, 1974 (May 21, 2007) (quoting, altering the traditional 12(b)(6) standard of *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). To survive a motion to dismiss, the complaint's factual allegations "must be enough to raise a right to relief above the speculative level" and must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 1965. This Court need not accept legal conclusions or unwarranted factual inferences. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir. 1988) (though the "standard for Rule 12(b)(6) is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements"); *Tritent Int'l Corp. v. Kentucky,* 467 F.3d 547, 554 (6th Cir. 2006).

B. Statutory Requirements

Resolution of this motion turns on whether Plaintiff, an appointed public official, was a county or State employee. There is conflicting authority. To the best of his knowledge, Plaintiff was a Bradley County employee – his paychecks were cut by the "Bradley County Executive" (File No. 13-2). However, in the motion to dismiss, Defendant points out code sections,

case law, and State Attorney General opinions which suggest Plaintiff is functionally a State employee. On balance, the Court agrees with Defendant's interpretation and concludes Plaintiff is an employee of the State of Tennessee and not of Bradley County.

In *Durham v. Dismukes,* 333 S.W.2d 935 (Tenn. 1960), the Tennessee Supreme Court offered a test to help decide whether an official functions as a county or State employee. The court found a Sumner County General Sessions judge to be a county employee based on consideration of (1) whether the county or State bore the judge's salary and (2) whether the statute creating the position demonstrated an intent to extend the position beyond the county's borders. *Id.* at 938. The Court declared the "primary badge" of a State official/employee was that the State paid the official's salary. *Id.* at 939. In *Stambaugh v. Price,* 532 S.W.2d 929 (Tenn. 1976), the Court cited and added to the *Durham* test:

> Where no legislative intent is apparent to create a court with jurisdiction beyond the county; where the county bore the expense of the court, paid the judge's salary, and was entitled to the fees collected; and where 'the overall duties are applicable to the people of the county alone'; it was held that [the challenged official] was a county, not a State, office.

Id. at 933. In *Spurlock v. Sumner County,* 42 S.W.3d 75 (Tenn. 2001), the Tennessee Supreme Court relied on the United States Supreme Court's opinion in

McMillian v. Monroe County, 520 U.S. 781 (1997) (brought under 42 U.S.C. § 1983). *McMillian* considered whether a sheriff was a State or county employee under Alabama law. The Supreme Court stated, a "court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *Id.* at 784-86. In essence, a court must analyze the official's role functionally, and must apply State law.

In *Spurlock,* the Tennessee Supreme Court considered *McMillian, Durham,* and *Stambaugh* in reevaluating whether a sheriff was a State or county employee. The court noted (1) the county paid the sheriff's salary, and (2) the enacting statute suggested an intent to limit the sheriff's jurisdiction within the county. *Id.* at 79-80. At the same time, the sheriff's position was created, and its duties were set out, by State statute. The Court weighed the authorities. It found greater weight in favor of the sheriff as a county employee. *Id.* at 78, 80 (quoting *McMillian,* 520 U.S. at 804) ("we hold that under Tennessee law, [a] 'sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he [or she] seems to be: a county official'"). At the same time, the court cited but did not overrule *Dykes v. Hamilton,* 191 S.W.2d 155 (Tenn. 1945) ("the mere fact that a person may

hold an important public office whose duties are strictly confined to county affairs, and his salary paid by the county, does not make it a county office").[1]

In following the example of the above cases, this Court will begin with the Tennessee Code and case law, to evaluate the functions of the Administrator's position, the budgetary burden, the legislative intent, and the jurisdictional limitations.

Tennessee law creates a State Election Commission to oversee State elections and secure the "freedom and purity" of the ballot and participation by all citizens in the electoral process. Tenn. Code Ann. § 2-1-102. The State Election Commission appoints County Election Commissions ("Commissions"), whose five members serve two-year terms. Tenn. Code Ann. § 2-12-101. Commissions are quasi-independent bodies which oversee municipal, county, and State elections within their geographic jurisdiction. *Id.*; *Abercrombie*

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[1] In *Pharris v. Looper,* 6 F. Supp. 2d 720 (M.D. Tenn. 1998), the plaintiffs, former employees of the property assessor ("Assessor") in Putnam County, sued the defendant Assessor and the county for civil rights violations under 42 U.S.C. § 1983. The county argued the State was liable for the lawsuit because the Assessor was a State employee. In support of this contention, the county argued: (1) the Assessor was a constitutionally created office, (2) his qualifications and salary were set by State law, (3) he was State-supervised, and (4) he was permitted by statute to appoint his own staff. *Id.* at 729-30. The district court disagreed, in part because it found the county exercised control over the Assessor's salary, election, vacancies, bond, and recruiting. *Id.* at 730.

v. Chattanooga, 313 S.W.2d. 256, 262 (Tenn. 1958) (holding Commissions exist under general law of the State, are not part of any State political sub-division, and are "not an arm of the county government"). Commissions are created by and their powers are defined by the Tennessee Code. They and their staff perform important but ministerial, duties with very limited discretion such as preparing ballots and overseeing elections. *E.g., City of Memphis v. Shelby County Election Comm'n,* 146 S.W.2d 513, 535-36 (Tenn. 2004) ("[n]onetheless, as ministerial officers, the Commission and the Coordinator have limited discretion"); *Shelby County Election Comm'n v. Turner,* 755 S.W.2d 774, 776 (Tenn. 1988) (Commission "has only ministerial duties"); *Peeler v. State ex rel. Beaseley,* 231 S.W.2d 321, 323 (Tenn. 1950) (same). Section 2-12-109 mandates a Commission be funded by the county it serves; however, if a Commission oversees a municipal election, the municipality pays its expenses, and the State pays for special State elections and residential primaries. Tenn. Code Ann. §§ 2-12-108 & 109.

Administrators (amended in 1997 from the term "registrars") are employed by each county's Commission. Section 2-12-201 creates the role and sets out its responsibilities, which are generally to oversee the Commission's daily operations, manage the budget and personnel, maintain voter registration and campaign disclosure records, train and disseminate election information to the public, and advise interested parties on redistricting or reapportionment. The

minimum salary for an Administrator is set by State law although the actual dollars come from the county treasury. Tenn. Code Ann. § 2-12-208. The State will pay a portion of the salary if the Administrator passes an annual certification exam prepared by the State Election Commission and the Coordinator of Elections. Tenn. Code Ann. §§ 2-12-202(b) & 209. If the county accepts State funds, a Commission is entitled to at least the same appropriations level from the county as the preceding year. If a county refuses to commit sufficient funds, a Commission may request an administrative hearing from the Coordinator of Elections. Tenn. Code Ann. § 2-12-209(c). This salary-sharing provision does not automatically confer on an Administrator the status of a State employee. Tenn. Code Ann. § 2-12-210. Administrators and Commission members) are subject to county purchasing and budgetary laws.[2]

On the other hand, in somewhat dated opinions, the Attorney General of Tennessee has construed Commissions as being "hybrid agencies," bearing both State and county responsibilities. The Attorney General's office decided Administrators were State employees for purposes of workers compensation

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[2] Also weighing on the county employee side of the debate, Tenn. Code Ann. § 8-17-102 (Ethical Standards for Officials and Employees) states "Furthermore, for the purpose of this chapter, the county election commission shall be considered an instrumentality of county government; and the administrator of elections and other employees of the election commission shall be considered county employees."

eligibility. Tenn. Op. Atty. Gen. No. 85-017, 1985 WL 193601 (Jan. 17, 1985) (citing cases in which State judges had held Commissions and Administrators were State officers and could not be controlled or supervised by a county: *Tennessee ex rel. Wayne County Election Comm'n v. Wayne County,* no cite given, opinion by Judge Matherne (Tenn. Ct. App. Dec. 1, 1978); *Tennessee ex rel. Hawkins County Election Comm'n v. Hawkins County Bd. of Comm'nrs,* no cite given, opinion by Judge Franks (Tenn. Ct. App. Apr. 24, 1981)). Because Commissions are appointed by, and may only removed by, a State body, and because baseline salaries are set by statute, the Attorney General concluded, "the usual provisions of law involving county employees and fiscal matters do not apply to the [Commissions], and the employees of the commission are not county employees." Tenn. Op. Atty. Gen. No. 78-266, 1978 WL 27206 (June 27, 1978). Another opinion determines Commission members to be State officers such that they could not concurrently serve as elected officials or public employees. Tenn. Op. Atty. Gen. No. 78-139, 1978 WL 27083 (Mar. 23, 1978).

C. Common Law Agency Test

Black's Law Dictionary defines an "employee" as someone who "works in the service of another . . . under which the employer has the right to control the details of work performance." In fact, the employer's right to control the employee has long been the touchstone for determining whether an employment

relationship exists. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991); *Carver v. Sparta Elec. Sys.*, 690 S.W.2d 218, 220 (Tenn. 1985); *Arledge v. Omega Meats, Inc.*, 2003 WL 23471544, *2 (E.D. Tenn. Dec. 4, 2003). The employer's right is to control both the ends and the manner and means by which the business is done. *See, e.g.*, Restatement (Second) of Agency § 2; C.J.S. Employee § 8. The employer's power to hire and fire is essential to and constitutes indicia of an employment relationship; other factors indicative of the employer's right to control are the employer's right to establish work boundaries, to rebuke/reward an employee, to set working hours, to assign duties, and to create job security. C.J.S. Employee § 8 (collecting cases); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992).

In evaluating whether a hired party is an independent contractor or an employee, in federal employment cases, the United States Court of Appeals for the Sixth Circuit applies the common law agency test. *E.g., Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998) (ADA case) (citing *Darden*, 503 U.S. at 322). The analysis, while not binding here, is instructive. The common law test requires consideration of numerous factors, such as "the hiring party's right to control the manner and means by which the product is accomplished," "the hiring party's right to assign additional projects," and "the hired party's role in hiring and paying assistants." *Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996) (citing *Darden*, 503 U.S. at 323-24). Applying such factors, the

court in *Shah v. Deaconess Hosp.*, 355 F.3d 496 (6th Cir. 2004) found a surgeon was an independent contractor and not a hospital employee, because there was no evidence the hospital could control "the manner and means" of the surgeon's performance, and there was no evidence the hospital could "interfere with [the surgeon's] medical discretion or otherwise." *Id.* at 500.

III. DISCUSSION

Clearly, the authorities are split. As the Tennessee Supreme Court held in *Spurlock*, this Court must determine whether the greater weight of authority supports defining Administrators, Plaintiff specifically, as State or county officials. 42 S.W.2d at 78. After examining the Tennessee Code, relevant case law, and the persuasive Attorney General opinions, the Court concludes an Administrator of Elections under Tennessee law is a State official, not a county official, and Defendant's motion must be **GRANTED.**

The first criteria this Court must consider is who bears Plaintiff's salary expense. It is clear the county does, as evidenced by Plaintiff's paystub (File No. 13-2), and by Sections 2-12-208 & 209 of the Tennessee Code. Plaintiff also received life and health insurance and retirement benefits from Defendant (File No. 13, p. 2). Yet the baseline Administrator salary is set by State law. Tenn. Code Ann. § 2-12-208. The State sometimes pays its share of the salary cost, although its payments are not to be construed as rendering an

Administrator as a State official. Tenn. Code Ann. §§ 2-12-209 & 210.[3] A county may not reduce an Administrator's salary – or the Commission's budget, for that matter – beyond the prior year's; in short, the county's budgetary discretion is clipped. *Id.*; *see also* Tenn. Op. Atty. Gen. No. 78-266. Though Plaintiff does not wear the "primary badge" of a State official, *Durham,* 333 S.W.2d at 939, this criteria does not contribute overwhelmingly to the county employee side of the scale because of the county's limited discretion in obligating its funds towards a Commission or an Administrator.

The second criteria to consider is Plaintiff's jurisdiction as an Administrator, i.e. whether his authority exists beyond the county's bounds. Plaintiff's role was to manage the day-to-day operations of the Bradley County Election Commission. It appears his authority was restricted within the county's geographic limits. At the same time, *Abercrombie* held a Commission was "not an arm of the county

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[3] This would be strong evidence of Plaintiff's position as a county employee, but for the limiting text in Section 2-12-210 ("[n]othing in Acts 1986, Ch. 930") and *McMillian's* admonition requiring federal courts to perform independent evaluations of whether a challenged official is a State or county employee. *See McMillian,* 520 U.S. at 586 ("This is not to say that State law can answer the question for us by, for example, simply labeling as a State official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.").

government." 313 S.W.2d. at 262. Though important, this factor is not dispositive.

The most significant factor in evaluating whether Plaintiff is a State employee appears in *Stambaugh's* restatement of the *Durham* test. The Tennessee Supreme Court found where "the overall duties are applicable to the people of the county alone," the individual was a county official. 532 S.W.2d at 933. Plaintiff's duties were not owed to the county alone. Plaintiff helped manage federal, State, county, and municipal elections. *Parker v. Bedford County Election Comm'n,* 2006 WL 622775, *4 (Tenn. Ct. App. Mar. 14, 2006) ("[t]he election administrator and chief staff person for the county election commission . . . has statutory duties to the public and to candidates for public office. [The] duties include the '[c]ompilation, maintenance and dissemination of information to the public, the candidates, the voters, the press and all inquiring parties in regard to all aspects of the electoral process on all governmental levels.' [An Administrator] is also charged with '[h]aving knowledge of all current laws pertaining to the election process and any changes mandated by the general assembly, and apprising the election commission, office staff, candidates, the press and the public in general of this information.") (citing Tenn. Code Ann. § 2-12-201(a)(9) & (12)).

In *Pharris,* the federal district court found an Assessor was not a State employee because the county controlled his election, vacancies, the setting of a bond, and recruiting. 6 F. Supp. 2d at 730. On the

contrary, Plaintiff was employed by the Bradley County Election Commission, the members of which were in turn appointed and removed by the State Election Commission. Tenn. Code Ann. § 2-12-101. Vacancies would be filled by the State Election Commission. Tenn. Code Ann. § 2-12-106. In other words, Defendant had little control over Plaintiff's selection. If everyone above Plaintiff, responsible for his hiring and firing, was a State official and appointed by the State, it would be unfair to hold Defendant liable for actions taken without its input, direction or sway.[4]

Finally, looking at the traditional indicia of employment, i.e. whether Defendant exercises a right of control over Plaintiff, it is even more obvious Plaintiff is a State employee, despite the "payor" on his paystub. By statute, Defendant was not able to hire or fire Plaintiff, abolish Plaintiff's position, or even lower Plaintiff's compensation below the prior year's. It appears most of Plaintiff's duties are set out in Tenn. Code Ann. § 2-12-201, so Defendant could not set Plaintiff goals or the "manner and means" by which to achieve such goals. The Commission, not Defendant County, was responsible for employing assistants for Plaintiff. *Id.* In sum, applying the common law agency test and the traditional test for determining whether an employment relationship

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[4] *But see Loveday v. Sevier County,* 2000 U.S. Dist. LEXIS 4017 (E.D. Tenn. Mar. 20, 2000) (Phillips, M.J.) (assuming without discussion an Administrator to be a county employee).

exists, Plaintiff is clearly controlled by the Commission, State law, and ultimately, the State. The county has little control over his actions and work-product.

IV. SOVEREIGN IMMUNITY

In its motion to dismiss Defendant argues this Court does not have subject matter jurisdiction over this dispute, because if Plaintiff is a State employee, Tennessee's sovereign immunity bars a lawsuit under FMLA's "self care" provision or under the ADA (File No. 12, p. 4). Plaintiff fails to address this argument in his response. This Court also declines to address the argument – the Court will **DISMISS** Plaintiff's complaint on the grounds Defendant is not the proper defendant, as Defendant is not Plaintiff's employer. However, to rule on the sovereign immunity argument would be to render an advisory opinion. "The jurisdiction of federal courts is limited by Article III of the United States Constitution to consideration of actual cases and controversies, therefore federal courts are not permitted to render advisory opinions." *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 627 (6th Cir. 1987).

V. CONCLUSION

For the foregoing reasons, the Court will **GRANT** Defendant's motion to dismiss (Court File No. 10). An order will enter.

/s/ _____
CURTIS L. COLLIER
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

DAVID ELLIS, Plaintiff, v. BRADLEY COUNTY, TENNESSEE, Defendant.	)	Case No. 1:06-CV-260 Chief Judge Curtis L. Collier

ORDER

(Filed Jun. 22, 2007)

This matter is before the Court on the motion to dismiss filed by defendant Bradley County (Court File No. 10). For the reasons set forth in the accompanying memorandum, the Court **GRANTS** this motion. The Court **ORDERS** the Clerk to **DISMISS** the complaint (Court File No. 1) filed by plaintiff David Ellis **WITH PREJUDICE AGAINST THIS DEFENDANT.**

SO ORDERED:

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

s/ *Patricia L. McNutt*
CLERK OF COURT

No. 07-5929

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ELLIS, Plaintiff-Appellant, v. BRADLEY COUNTY, TENNESSEE, Defendant-Appellee.	)	ORDER (Filed Sept. 18, 2008)

BEFORE: MARTIN, GRIFFIN, and GIBSON,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit of Appeals, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

DAVID ELLIS,	)	
Plaintiff,	)	**Case No. 06-CV-260**
vs.	)	**Judge**
BRADLEY COUNTY, TENNESSEE,	)	**Magistrate Judge**
Defendant.	)	**Jury Demand**

COMPLAINT

(Filed Dec. 7, 2006)

For his Complaint against Defendant Bradley County, Tennessee ("Defendant"), Plaintiff David Ellis ("Plaintiff") states:

I. PARTIES

1. Plaintiff is a citizen and resident of Cleveland, Tennessee, and a former employee of Defendant.

2. Defendant's [sic] is a Tennessee governmental entity with its principal place of business in Cleveland, Tennessee. Defendant employs over 500 individuals.

3. Defendant may be served with process through Mary Frances Armstrong, Chairman, Bradley County Election Commission, 155 Broad Street, Cleveland, Tennessee 37311.

II. JURISDICTION AND VENUE

4. This is an action for equitable relief and damages for unlawful employment practices brought under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("FMLA"), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"), the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* ("THRA"), the Tennessee Handicap Act, Tenn. Code Ann. § 8-50-103 ("THA"), and Tennessee law. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4), and 1367(a). Venue is proper under 28 U.S.C. § 1391.

5. Plaintiff has met all conditions precedent to the filing of this Complaint. Plaintiff timely filed a Charge of Discrimination with the Tennessee Human Rights Commission and the Equal Employment Opportunity Commission on July 27, 2006, and August 17, 2006, respectively. The EEOC mailed Plaintiff a Notice of Right to Sue on October 25, 2006.

III. FACTS

A. Background

6. Plaintiff served as Administrator of Elections for Defendant's Election Commission from 1984 until Defendant fired him on October 6, 2006.

7. Plaintiff was qualified for his job with Defendant.

8. Plaintiff performed his job for Defendant in a competent and satisfactory manner.

9. Plaintiff received favorable performance evaluations and pay increases from Defendant during his employment.

B. FMLA Claims

10. Defendant is a covered employer under the FMLA.

11. Plaintiff was eligible for and entitled to FMLA leave in April 2006.

12. In April 2006 Plaintiff sought FMLA leave from Defendant for a serious health condition.

13. Defendant approved and granted Plaintiffs request for FMLA leave.

14. On or about June 13, 2006, Plaintiff returned to work prepared and able to perform his job.

15. Plaintiff provided Defendant a letter from his physician releasing him to return to work in his job position.

16. Defendant failed and refused to reinstate Plaintiff to the job position that he held before he exercised FMLA rights or to an equivalent position, in violation of the FMLA.

17. Defendant interfered with Plaintiff's exercise of FMLA rights.

18. Defendant retaliated against Plaintiff for exercising FMLA rights.

C. Disability Discrimination Claims

19. Plaintiff has Crohn's Disease.

20. Defendant was aware that Plaintiff has Crohn's Disease.

21. As a result of this condition, Plaintiff is substantially limited in one or more major life activities or, alternatively, Defendant regarded him as such.

22. Plaintiff was otherwise qualified to perform the essential functions of his job for Defendant, with or without reasonable accommodation.

23. Defendant failed and refused to reasonably accommodate Plaintiff's disability or perceived disability.

24. Defendant failed to engage in an interactive process with Plaintiff designed to identify reasonable accommodations of his disability or perceived disability.

25. After he attempted to return to work, Defendant refused to communicate with Plaintiff about the status of his job.

26. Defendant replaced Plaintiff with a non-disabled individual or an individual whom it did not regard as disabled.

D. Retaliation Claims

27. Following his unsuccessful attempt to return to work, Plaintiff complained about, opposed and reported FMLA violations and disability discrimination to Defendant and requested reasonable accommodation.

28. After Plaintiff opposed illegal conduct, Defendant purportedly "reinstated" Plaintiff to his job position on August 4, 2006, but also immediately "suspended" him.

29. Defendant subsequently fired Plaintiff on October 6, 2006.

30. Plaintiff's opposing illegal activity was a substantial motivating factor in Defendant's decision to fire him.

E. Additional Claims

31. Defendant treated Plaintiff differently and less favorably in the terms, conditions, privileges, and benefits of employment than it treated employees who did not engage in legally protected activity and who were not disabled or regarded as disabled.

32. Defendant subjected Plaintiff to adverse employment action based on Plaintiff's engaging in protected activity and/or his disability or Defendant's perception that he was disabled.

33. Defendant's purported reasons for its adverse actions are pretexts for discrimination and retaliation.

34. Plaintiffs engaging in protected activity and/or his disability or Defendant's perception that he was disabled were motivating factors in the adverse action suffered.

35. Defendant discriminated and retaliated against Plaintiff in violation of the FMLA, the ADA, the THRA, the THA, and Tennessee law.

36. Defendant acted intentionally, maliciously, willfully, and with reckless indifference to Plaintiff's protected rights.

37. Additionally, Defendant's election commission conducted meetings and votes with respect to Plaintiff's employment that were required to be open to the public in secret and without notifying Plaintiff, in violation of the Tennessee Open Meetings Act, Tenn. Code. Ann. § 8-44-101, *et seq*.

38. Defendant's actions in suspending and firing Plaintiff were void or voidable as they were in violation of the Open Meetings Act and against public policy.

39. As a result of Defendant's conduct described in this Complaint, Plaintiff has lost income and other privileges and benefits of employment.

40. As a result of Defendant's conduct, Plaintiff has suffered embarrassment, humiliation, stress,

anxiety, pain and suffering, and loss of enjoyment of life, and has incurred attorneys' fees and expenses.

IV. RELIEF REQUESTED

Plaintiff respectfully requests:

1. That process issue and that Defendant be required to respond to this Complaint within the time period prescribed by law;

2. That a jury be empanelled to hear and decide the merits and damages;

3. That judgment be entered in Plaintiff's favor;

4. Back pay and damages for lost benefits;

5. Compensatory damages for embarrassment, humiliation, stress, anxiety, pain and suffering, and loss of enjoyment of life;

6. Reinstatement or front pay;

7. Liquidated damages;

8. Punitive damages;

9. Attorneys' fees and expenses;

10. Prejudgment interest; and

11. Such other and further legal or equitable relief to which he may be entitled.

Respectfully submitted,

/s/ Douglas B. Janney III

Douglas B. Janney III
(BPR No. 19112)
2002 Richard Jones Road
Suite B-200
Nashville, Tennessee 37215
(615) 742-5900

Attorney for Plaintiff

Douglas B. Janney III
Attorney at Law
2002 Richard Jones Road, Suite B-200
Nashville, Tennessee 37215

Telephone (615) 742-5900
Facsimile (615) 742-5958
Email doug@janneylaw.com

www.janneylaw.com

December 4, 2007

Mr. Leonard Green, Clerk
United States Court of Appeals, Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988

Re: ***David Ellis v. Bradley County, Tennessee*, No. 07-5929**

Dear Mr. Green:

In accordance with Federal Rule of Appellate Procedure 28(j), Appellant David Ellis respectfully submits the attached proposed legislation of the Tennessee Legislature, which may also be accessed online at http://www.legislature.state.tn.us/bills/currentga/BILL/SB1650.pdf, along with the "Bill Summary for SB1650 / HB1121." This information supplements Appellant's argument at pages 16-17 of his Proof Brief. The proposed legislation indicates at pages three and four that Tenn. Code Ann. § 2-12-209 would be "amended by deleting the section in its entirety and substituting instead" the following:

> The state shall be responsible for paying the compensation of all certified administrators of elections and all other employees of the county election commission. Beginning July 1, 2007, all employees of the county election commission shall be deemed state employees for the purposes of insurance, workers' compensation leave, all benefit programs, retirement, compensation increases or other related matters. Any period of service as an employee of the county working for the county election commission as a full-time employee shall be creditable service under the Tennessee consolidated retirement system.

It is Appellant's understanding that this proposed legislation did not pass. Accordingly, county election administrators such as Mr. Ellis remain county employees. Furthermore, even if the legislation had passed, it would not have taken effect until July 1, 2007. Mr. Ellis was discharged on October 6, 2006. (Appellant's Brief at 5). Mr. Ellis was compensated by Bradley County and did not enjoy the substantial benefits that all Tennessee state employees enjoy, including but not limited to membership in the Tennessee consolidated retirement system. (*Id.* at 15).

Thank you for your attention to this matter, and please contact me with any questions or concerns.

Sincerely,

/s/ Douglas B. Janney III
Douglas B. Janney III

cc: Thomas E. LeQuire, Esq.
David M. DiScenza, Esq.

---

* * *

2-12-209. The state shall be responsible for paying the compensation of all certified administrators of elections and all other employees of the county election commission. Beginning July 1, 2007, all employees of the county election commission shall be deemed state employees for the purposes of insurance, workers' compensation, leave, all benefit programs, retirement, compensation increases or other related matters. Any period of service as an employee of the county working for the county election commission as a full-time employee shall be creditable service under the Tennessee consolidated retirement system.

SECTION 16. Tennessee Code Annotated, Section 8-20-120, is amended by deleting the third and fourth sentences of the section.

SECTION 17. Tennessee Code Annotated, Section 8-21-401(h)(3), is hereby amended by deleting the language "six and seventy-five hundredths

percent (6.75%)" and substituting instead the language "twenty percent (20%)".

SECTION 18. Tennessee Code Annotated, Section 8-21-701(55), is hereby amended by deleting the language "five percent (5%)" and substituting instead the language "twenty percent (20%)".

SECTION 19. Tennessee Code Annotated, Section 16-2-505(d), is amended by adding the following as a new subdivision (5):

> (5) The state of Tennessee shall reimburse each county on an annual basis for all expenses incurred in carrying out the requirements of this subsection (d). Expenses shall include, but shall not be limited to, reasonable rent and utilities for space used in county owned buildings. At the end of each fiscal year, the county shall provide to the comptroller of the treasury a statement of all expenses incurred, and the state shall reimburse the county within ninety (90) days after receipt of such invoice.

* * *

IN THE UNITED STATES COURT, OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ELLIS, Plaintiff-Appellant	)	
v.	)	No. 07-5929
BRADLEY COUNTY, TENNESSEE, Defendant-Appellee.	)	

AFFIDAVIT OF STATE COORDINATOR OF ELECTIONS BROOK K. THOMPSON

(Filed Jun. 20,2008)

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, Brook K. Thompson, being duly sworn, do hereby affirm the following:

1. I am the Coordinator of Elections for the State of Tennessee and have held this position since November, 1995. I am over the age of eighteen years, and I am competent to testify in the matters set forth herein.

2. Pursuant to Tenn. Code Ann. § 2-11-201(b), the State Coordinator of Elections is the chief administrative election officer of the state and is to obtain and maintain uniformity in the application, operation and interpretation of the election code.

3. My duties as State Coordinator of Elections are set forth in Tenn. Code Ann. § 2-11-202, including the duty to authoritatively interpret the election laws for all persons administering them, I am also required to develop the annual budget for the Elections Division of the Tennessee Secretary of State's Office and to review and approve any expenses incurred by the Elections Division.

4. As Coordinator of Elections, I also serve as staff for the State Election Commission. As such, I am familiar with the duties, responsibilities and actions of the State Election Commission. I am also familiar with the annual budget for the State Election Commission as I am required to review and approve their budget and all expenses incurred by the State Election Commission must be approved by me.

5. Pursuant to state law, I, in conjunction with the State Election Commission am required to prepare and administer a written examination on election laws to any administrator who desires to take the examination to become a certified administrator of elections. I and the State Election Commission determine whether or not an administrator passes or fails this examination.

6. To my knowledge as State Coordinator of Elections and as staff for the State Election Commission, we have consistently viewed county administrators of elections to be county employees, not state employees, and have correspondingly treated them as county employees. To my knowledge, neither I, as the

State Coordinator of Elections, nor the State Election Commission has ever hired, fired or taken any disciplinary action with respect to any county administrator of elections. Tenn. Code Ann. § 2-12-201(a)(1) specifically provides that the county election commission shall appoint an administrator of elections. Moreover, when we get inquiries from county election commissions with respect to taking disciplinary action against their administrator of elections, we have consistently advised them to consult with their county attorney and we have otherwise declined to provide any such advice as we do not consider county administrators of election to be state employees. In addition, it is my understanding that, under state law, the only authority the State Election Commission has with respect to a county administrator of elections is the authority to revoke such administrator's certification (if certified) for failure to attend mandatory annual training and/or to substantially perform the duties of the office.

7. The annual budget for the Elections Division of the Tennessee Secretary of State's Office includes appropriations for the salary, health insurance, longevity pay and retirement benefits only for the employees of that Division. To my knowledge, the budget of the Elections Division has never included any appropriation for the salary, health insurance, longevity pay and retirement benefits for county administrators of elections and no payments for the salary, health insurance, longevity pay and retirement

benefits of a county elections administrator have ever been made out of that budget.

8. The annual budge [sic] for the State Election Commission includes appropriations for the salary, health insurance and retirement benefits only for the members of the State Election Commission. To my knowledge, the budget of the State Election Commission has never included any appropriation for the salary, health insurance and retirement benefits for county administrators of elections and no payments for the salary, health insurance retirement benefits for county administrators of elections have made out of that budget, other than the $16,380 supplement for certified administrators of elections authorized by Term. Code Arm. § 2-12-209(a).

9. This supplement was part of a comprehensive scheme enacted by the Tennessee General Assembly in an attempt to make the office of the county administrator of elections more professional and to ensure that such officials would receive a minimum base salary. In adopting Public Chapter 930 of the Acts of 1986, the General Assembly established the procedures for a county administrator of elections to become certified by taking and passing a written examination administered by the State Coordinator of Elections and the State Election Commission. Tenn. Code Ann. § 2-11-202(b). The General Assembly further provided that upon becoming a certified administrator of elections, such administrator would then receive as a "base minimum yearly salary at least ninety percent (90%) of the base salary of the

county's assessor of property, if the office of such administrator is open five (5) full days a week." Tenn. Code Ann. § 2-12-208(a). However, the General Assembly specifically provided that these "minimum salaries for certified administrators provided by this section shall be paid by the county for which such administrator is employed." Tenn. Code Ann. § 2-12-208(b). Additionally, the county, and not the state, is authorized to raise or otherwise pay a salary greater than the minimum salary provided in Tenn. Code Ann. § 2-12-208(a).

10. In order to help offset the cost of this requirement of a minimum base salary for certified administrators of elections, particularly in the smaller counties of the state, the General Assembly authorized the payment of $16,380 supplement to those counties with a certified administrator of elections. Those payments are made to the each county's general fund and not to the county election commission or the county administrator of elections. Moreover, the Tennessee General Assembly specifically declared in Public Chapter 930 that the authorization of this payment of a supplement to the counties should not "be construed as conferring upon any county election commission, administrator of elections or any other county election official, status as a state employee." Tenn. Code Ann. § 2-12-210.

11. As State Coordinator of Elections, I am required to be familiar both with existing state election laws, as well as any proposed legislation that would affect the state's election laws. I am personally

aware that during the 105th Tennessee General Assembly, legislation was introduced by Senator Doug Jackson and Representative Frank Buck (SB 1650/HB 1121) that would specifically have made employees of the county election commission, including the administrator of elections, state employees with state employment benefits and that would have removed the authority of county commissions to increase the compensation for such employees as they are currently authorized to do under state law. Furthermore, this legislation would have required the county administrator of elections to submit an annual budget for funding to me, as the State Coordinator of Elections, rather than to the county commission which state law currently requires them to do. This legislation was not adopted by the General Assembly.

12. Under Tennessee's election laws, county administrators of election do not have any significant duties or responsibilities with respect to the election process outside their own county, except in the limited circumstance where there is a municipal election to be held in a municipality that lies in more than one county. In that instance, the county administrators of elections for those two counties will share some responsibilities conducting that municipal election.

13. Neither I, as the State Election Coordinator, nor any employee in the Elections Division of the Tennessee Secretary of State's Office, nor any member of the State Election Commission, hired Mr. David Ellis to be the county administrator of elections for Bradley County, Tennessee, nor fired Mr. Ellis or

otherwise took any disciplinary action against Mr. Ellis while he held the office of county administrator of elections, because we considered Mr. Ellis to be a county employee, just like we consider the other ninety-four (94) county administrators of election to be county employees and not state employees.

FURTHER AFFIANT SAITH NOT.

/s/ Brook K. Thompson
BROOK K. THOMPSON

[SEAL] Sworn to and subscribed before me this 19th day of June, 2008.

/s/ H. Dianne Ries
NOTARY PUBLIC

My Commission Expires: 9/20/2008

120 (2)

No. 08-814

Supreme Court, U.S.
FILED
FEB 16 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID ELLIS,
Petitioner,

v.

BRADLEY COUNTY, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Thomas E. LeQuire
Counsel of Record
David M. DiScenza
Spicer Flynn & Rudstrom, PLLC
537 Market Street, Ste. 203
Chattanooga, TN 37402
(423) 756-0262

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition where the Sixth Circuit's opinion affirming the District Court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) does not present a departure from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

2. Whether Petitioner has presented compelling reasons why this Court should certify a question to the Tennessee Supreme Court when there is no uncertain question of state law whose resolution is determinative to the disposition of the federal claim.

PARTIES

The parties to this proceeding are accurately set forth in the caption.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Bradley County, TN is a governmental agency and there is no parent or publicly held company that owns 10% or more of the governmental corporation's stock.

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INTRODUCTION

Petitioner has presented no compelling reasons for his Petition for Writ of Certiorari to be granted by this Court. *See* Sup.Ct.R.10. Petitioner's attempt to comply with the court's rules governing review of lower court decisions is nothing more than a veiled attempt to argue alleged misapplication of a well stated rule of law.

Petitioner's claim that the court of appeals deviated from the usual and accepted course of judicial proceedings is without merit. Petitioner's argument is premised on the misguided theory that a party's "employer" is a factual allegation precluding dismissal under Fed. R. Civ. P. 12(b)(6). For the purposes of federal employment statutes, a party's "employer" is a legal conclusion which is determined as a matter of law by the court. Therefore, there is no departure from the usual and accepted standards in the dismissal of the action pursuant to Fed. R. Civ. P. 12(b)(6).

Petitioner's argument that the case should be certified to the Tennessee Supreme Court likewise lacks merit. There is no uncertain question of Tennessee law which would be determinative in this action.

STATEMENT OF THE CASE

Plaintiff was employed as the administrator of the Tennessee Election Commission sitting in Bradley County, TN. (Pet.App. at 5a). On October 6, 2006, Plaintiff was terminated from his position by the election commission. (Pet. App. at 5a).

On December 7, 2006, Plaintiff filed suit against Bradley County, TN, alleging that his termination was in violation of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, et seq., the Americans with Disability Act of 1990, 42 U.S.C. §§ 1201, et seq., and multiple state law causes of action. (Pet. App. at 5a). Plaintiff's complaint makes the erroneous legal conclusion that his "employer" was Bradley County, TN. (Pet. App. at 25a).

On March 13, 2007, Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)[1]. In the motion, Defendant argued that Plaintiff was an employee of the state of Tennessee, and therefore, Bradley County was not the proper party for any actions based on alleged illegal employment actions. (Pet. App. at 4a).

On June 22, 2007, the district court for the Eastern District of Tennessee granted Defendant's

---

[1] Defendant's motion also included a 12(b)(1) motion based on sovereign immunity of the state of Tennessee under the 11th Amendment. The district court did not address the 12(b)(1) motion on the grounds that rendering an opinion on the 12(b)(1) motion would in violation of court's jurisdiction under Art. III of the United States Constitution. (Pet. App. at 19a).

motion. (Pet.App. at 4a). After a review of Tennessee Supreme Court and other case law, Tennessee Attorney General opinions, federal case law and Tennessee statutes, the court concluded that Plaintiff was an employee of the state of Tennessee, rather than Bradley County. (Pet. App. at 15a).

On appeal, the 6th Circuit affirmed the district court's dismissal of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). (Pet. App. at 1a). In its opinion, the 6th Circuit relied, in part, upon the Tennessee Supreme Court's holding in *Abercrombie v. City of Chattanooga*, 313 S.W.2d 256, 258 (Tenn.1958), which stated that a county election commission, "is not an arm of the county government." (Pet.App. at 3a).

The appellate court also found that the state election commission, rather than Bradley County, had the power to hire, fire, discipline and control Ellis. (Pet. App. at 3a). The 6th Circuit concluded that the various statutes regarding budgeting and finance, state and federal case law, and general agency principals resulted in Ellis being an employee of the State of Tennessee for the purposes of a federal employment law action. (Pet.App. at 3a).

REASONS FOR DENYING THE PETITION

The decision of the 6th Circuit Court of Appeals presents no issues worthy of this Court's attention. Petitioner attempts to create an issue regarding a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) conflicting with Fed. R. Civ. P. 8(a) based on the complaint's contention the Defendant was Plaintiff's "employer." This argument ignores differences between factual allegations and legal conclusions. The 6th Circuit correctly affirmed the dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6) because the status of a Plaintiff's "employer" is a legal conclusion which is properly decided by the court on a motion to dismiss.

Petitioner's argument that the case should be certified to the Tennessee Supreme Court is also lacking merit. Certification is only an appropriate remedy when there is a controlling issue of state law and there is no controlling precedent. Neither of these two factors are present.

While Petitioner has failed to show any deviation from the usual and accepted course of judicial proceedings, even if there was such a showing, the case would not be worthy of this Court's review. This case does not involve any principles of importance to the public, but rather has limited application only to the parties in this dispute. See, 16B Charles Ann Wright et al., *Federal Practice and Procedure* § 4004.1, at 27 (2d ed. 1987).

I. THE 6TH CIRCUIT COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL PURSUANT TO FED. R. CIV. P. 12(b)(6) DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner attempts to create confusion regarding the dismissal pursuant to Fed. R. 12(b)(6) by arguing that the complaint met the minimum pleading requirement of Fed. R. Civ. P. 8(a). (Pet. at 9). However, Rule 8(a) was never the grounds for any motion by Defendant, or ruling by any of the lower courts. (Pet. App. at 1a – 19a). The only actual issue regarding the dismissal of Plaintiff's complaint concerns whether the bare assertion that a defendant is a party's "employer" precludes dismissal pursuant to Rule 12(b)(6). Plaintiff's writ clearly fails to recognize the distinction between factual allegations and legal conclusions and the significance in the disposition of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

While a complaint attacked on a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, the complaint must contain more than labels and conclusions in order to provide grounds for entitlement to relief. *Bell Atlantic Co. v. Twombly*, 127 S.Ct. 1955, 1964-65, 550 U.S. 544 (2007) (quoting, *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). When the allegations in a complaint, however true, could

not raise a claim of entitlement to relief, "this basic deficiency should... be exposed at the point in time of minimum expenditure of time and money by the parties and the court." *Twombly*, 127 S.Ct. 1955 at 1966 (quoting, 5 C. Wright & A. Miller, Federal Practice & Procedure § 1216, pp. 233-234 (3d ed.2004)).

On a motion to dismiss, a court is not bound to accept a legal conclusion couched in terms of a factual allegation as true. *Twombly*, 127 S.Ct. 1955 at 165 (citing, *Papasan*, 478 U.S. 265 at 286). Whether a particular defendant is an "employer" in a federal civil rights case is a legal conclusion rather than a factual allegation which is properly decided by a court in a Rule 12(b)(6) motion. *Hickey v. O'Bannon*, 287 F.3d 656, 657-658 (7th Cir. 2002); *Montgomery v. Brookshire*, 34 F.3d 291, 295 (5th Cir. 1994); *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir.1991); *Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983); *Cobb v. Sun Papers*, 673 F.2d 337, 339 (11th Cir.), *cert. denied,* 459 U.S. 874, 103 S.Ct. 163 (1984).

In *Bristol v. Board of County Commissioners of the County of Clear Creek*, 312 F.3d 1213 (10th Cir. 2002), the 10th Circuit was examining a district court's dismissal as a matter of law of an Americans with Disabilities Act claim on the basis that the Defendant, the county board of commissioners, were not the Plaintiff's employer. The Plaintiff claimed that the employment actions of the Sheriff violated the A.D.A. and filed suit against the county *Id.*,at 1215. The county sought

dismissal on the grounds that it was not the Plaintiff's "employer" for the action.

The 10th Circuit examined such factors as who had ability to control or fire the Plaintiff, the state constitution and state budgetary statutes to determine, as a matter of law, whether the county was the proper defendant. *Id.*, at 1219. Ultimately, the court found that the Sheriff, not the county board, had the ultimate authority to hire or fire the Plaintiff and therefore, the Plaintiff's "employer" was the Sheriff, not the county. *Id.* at 1220.

The 11th Circuit has used the equivalent analysis in determining a Plaintiff's "employer" in a federal employment action. In *Welch v. Laney*, the court's dismissal was based on whether the alleged employer had the power to fire, hire, or modify the employment condition of the employee. *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). In *Welch,* the court affirmed the district court's dismissal of the county defendant pursuant to Rule 12(b)(6) on the basis that the county "had no direct control over Welch [plaintiff]." *Id.*

The district court and 6th Circuit in the case at bar undertook the same accepted analysis for determining Plaintiff's "employer" for the purposes of Plaintiff's federal civil rights claims. (Pet. App.at 1a – 19a). In its comprehensive analysis, the district court accepted all factual allegations in Plaintiff's complaint as true, and then determined

whether Defendant was Plaintiff's "employer" as a matter of law. (Pet. App. at 6a-7a).

In its examination, the district court in this case reviewed various Tennessee statutes, Tennessee Supreme Court and other case law, as well as common-law agency principles. (Pet. App. at 7a- 15a). The court ultimately concluded that Plaintiff was an employee of the state of Tennessee, and therefore Defendant was not Plaintiff's employer. (Pet. App. at 18a-19a).

In affirming the district court's dismissal, the 6th Circuit likewise considered the various statutes and case law. (Pet. App. at 3a). In its analysis, the 6th Circuit found, "Because the Bradley County Election Commission members are hired, fired and disciplined by the state election commission, Bradley County did not have the authority to hire, fire or discipline Ellis." (Pet. App. at 3a). The 6th Circuit affirmed the district court's dismissal on the basis that Bradley County was not Plaintiff's employer, and therefore not a proper defendant. (Pet. App. at 3a).

Petitioner has failed to show any departure from the accepted and usual course of judicial proceeding in the 6th Circuit's affirmation of the district court's dismissal of Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff's allegation that the county was his employer is a legal conclusion which is properly decided by the court as a matter of law.

Even if there were deviations from the accepted standard regarding dismissal pursuant to Fed. R. Civ. P. 12(b)(6), Petitioner has presented no "compelling reasons" worthy of this Court's review. The specific issue in this case has limited application to anyone other than Petitioner, and therefore, does not raise any issue of national interest.

II. THE 6th CIRCUIT WAS CORRECT IN NOT CERTIFYING THE QUESTION OF WHO WAS PLAINTIFF'S EMPLOYER TO THE TENNESSEE SUPREME COURT.

Certification is only appropriate when there is an uncertain question of state law that would affect the resolution of the federal claim. *City of Houston v. Hill,* 107 S.Ct. 2502, 2514, 482 U.S. 451 (1987)(citing, *Bellotti v. Baird,* 428 U.S. 132, 96 S.Ct. 2857 (1976)). However, as the court in *City of Houston* stated, "It would be ***manifestly inappropriate*** to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim." *Id.*(emphasis added).

In Tennessee, certification is controlled by Rule 23 of the Tennessee Supreme Court. Under Rule 23, certification may only be invoked when there are questions of law which will be determinative and as to which it appears that there is no controlling precedent in the decisions of the

Supreme Court of Tennessee. *Tennessee Rules of the Supreme Court* § 23.

"If a district court or court of appeals believed that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Lehman Brothers v. Schein*, 94 S.Ct. 1741, 1746, 416 U.S. 386 (1974).

In the case at bar, there are no uncertain questions of state law which are determinative. As both the district court and 6th Circuit pointed out, the Tennessee Supreme Court has specifically found the county election commission not to be an arm of the county government. (Pet. App. at 3a, 10a-11a); See, *Abercrombie v. City of Chattanooga,* 313 S.W.2d 256, 262 (Tenn.1958).

In addition to the clear Tennessee Supreme Court precedent, any such state labels are not determinative in the identity of Plaintiff's "employer" in the current action. The identification of an employer for purposes of federal employment discrimination acts "is a question of federal law." *Carver v. Sheriff of LaSalle County, Illinois*, 243 F.3d 379, 382 (7th Cir. 2001)(citing, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-55, 118 S.Ct. 2257 (1998)).

Certification in this case would be completely inappropriate. The Tennessee Supreme Court has established precedent that the election commission

is not an arm of the county government. In addition, any such determination by the Tennessee Supreme Court is not determinative because Plaintiff's "employer" for a federal civil rights case is determined according to *federal law* rather than state labels.

CONCLUSION

The Petitioner has failed to establish any compelling reasons to warrant this Court's review. The petition for writ of certiorari should be denied.

Respectfully submitted,

Thomas E. LeQuire, TN BAR #06875
Counsel of Record
David M. DiScenza, TN BAR #21863
SPICER, FLYNN & RUDSTROM, PLLC
537 Market Street, Ste. 203
Chattanooga, TN 37402
Telephone: (423) 756-0262
Fax: (423) 756-8489
E-mail: tel@sfrlaw.com
E-mail: dmd@sfrlaw.com

Counsel for Respondent
Bradley County, Tennessee

February 16, 2009

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(3)

No. 08-814

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID ELLIS,

Petitioner,

v.

BRADLEY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

DOUGLAS B. JANNEY III
LAW OFFICE OF
DOUGLAS B. JANNEY III
2002 Richard Jones Road
Suite B-200
Nashville, Tennessee 37215
(615) 742-5900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

The Court should grant Petitioner Ellis the relief he requests because the dismissal of his employment discrimination complaint under Federal Rule of Civil Procedure 12(b)(6) – not Rules 56 or 50 – for "failure to state a claim for relief" constitutes a gross departure from the accepted and usual course of judicial proceedings that calls for an exercise of the Court's supervisory power.

The lower courts' sole basis for dismissing Ellis' complaint was that he was not an "employee" of Respondent Bradley County, Tennessee, for purposes of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* ("FMLA") or the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Making this decision on a Rule 12(b)(6) motion before affording Ellis the opportunity to present evidence showing that he was an employee of the county conflicts with relevant decisions of this Court.

The Court has instructed that the definition of "employee" under the ADA must be interpreted broadly. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447-49 and n.6, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003) ("[A] broad reading of the term 'employee' would – consistent with the statutory purpose of ridding the Nation of discrimination – tend to expand the coverage of the ADA by enlarging the number of employees entitled to protection and by reducing the number of firms entitled to exemption.").

Moreover, the Court has repeatedly stated that "'all of the incidents of the [parties'] relationship must be assessed and weighed'" before making the determination of whether one is an "employee." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 324, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968) (examining "the total factual context")). In *Darden* the Court reiterated that:

> 'In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.'

Darden, 503 U.S. at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)).

This common law agency or "master-servant" test is applicable "when determining whether an individual is an 'employee' who may invoke the ADA's protections against discrimination in 'hiring, advancement, or discharge. . . .'" *Clackamas*, 538 U.S. at 447 n.6. Indeed, the United States Equal Employment Opportunity Commission has set forth guidelines that "list 16 factors – taken from *Darden* . . . that may be relevant to 'whether the employer controls the means and manner of the worker's work performance.'" *Id.* at 449. Application of the *Darden* test necessarily depends upon "the total factual context" as established by the factual "evidence." *Weary v. Cochran*, 377 F.3d 522, 524-28 (6th Cir. 2004), *reh'g denied* (applying *Darden* to "evidence that shed[s] light on how the parties themselves viewed the nature of their working relationship" and stating, "whether a plaintiff qualifies as an employee under the Act 'is a mixed question of law and fact'"); *Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998) (applying *Darden* in ADA case).

Here, the county affected Ellis' access to his job as detailed in his complaint (Pet. 26a-30a) and controlled his employment benefits as acknowledged by the lower courts. (Pet. 15a). Therefore, the county may be held liable under the ADA. *Christopher v. Stouder Mem. Hosp.*, 936 F.2d 870, 875 (6th Cir.), *cert. denied*, 502 U.S. 1013, 112 S. Ct. 658, 116 L. Ed. 2d 749 (1991) ("Title VII does not require a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the

defendant is one who significantly affects access of any individual to employment opportunities."); *Satterfield v. State of Tennessee*, 295 F.3d 611, 618 (6th Cir. 2002) (same for ADA) (citing *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1994) ("defendants would be 'employers' if they functioned as [the plaintiff's] 'employer' with respect to his employee health care coverage, that is, if they exercised significant control over an important aspect of his employment.")).

The definition of "employee" in the FMLA is even broader than that in the ADA. The FMLA incorporates by reference the definition used in the Fair Labor Standards Act. 29 U.S.C. § 2611(3). The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e). The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). Thus, the FMLA's definition of "employee" is broader than the common law definitions applied in ADA, ADEA, and Title VII cases. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (describing FLSA definition as "exceedingly broad"); *Darden*, 503 U.S. at 326 (same); *Fegley v. Higgins*, 19 F.3d 1126, 1131-32 and n.5 (6th Cir. 1994) (same).

Ellis was entitled to present evidence establishing that he was an "employee" of the county for purposes of the ADA and the FMLA. He was not afforded that opportunity. Had he been, he would have taken depositions of his former supervisors who

worked with him in Bradley County, Tennessee, and presented additional evidence – such as the Affidavit of State Coordinator of Elections Brook K. Thompson attached to his Petition (Pet. 37a-43a) – proving his allegation that he was an employee of the county. It cannot truthfully be said that Ellis could prove no set of facts sufficient to support his claims.

Contrary to the county's argument, this case involves important issues of procedural and substantive law that are implicated in employment discrimination cases nationwide. In cases like this courts should not be permitted to decide that a plaintiff is not an employee of an entity under the federal anti-discrimination statutes without allowing him to present factual evidence relevant to the appropriate factors and indicia of employment. *Darden*, 503 U.S. at 327-28. The lower courts' decisions were incorrect and constitute a stark departure from the normal course of judicial proceedings such that this Court should reverse and remand the case to avoid a miscarriage of justice.

Finally, the county's contention that the issue of whether one is an employee of the state is a matter of federal law is incorrect. (Br. Opp. 10); *Swint v. Chambers County Commission*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) ("The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the county commission's liability turns on the allocation of law enforcement power in Alabama."); *see also Spurlock v. Sumner County*, 42 S.W.3d 75, 81 (Tenn. 2001)

("whether an officer is a policymaker for any governmental entity must be determined by reference to state, not federal law."). Notwithstanding the isolated dicta in *Abercrombie v. City of Chattanooga*, 313 S.W.2d 256, 258 (Tenn. 1958) indicating that an election commission was "not an arm of the county government" in that case, the lower courts here acknowledged that "[t]here is conflicting authority" and "[c]learly, the authorities are split" on the issue of whether Ellis was a county or state employee. (App. 7a, 15a). The Tennessee Legislature recently declined to enact legislation that would have made county election administrators such as Ellis, who are not "members" of the election commission, state employees. (Pet. 33a-36a). The State of Tennessee neither paid Ellis nor discharged him from employment. The county represented to the I.R.S. on Ellis' Form W-2s that it was his employer and it discharged him. Thus, the county is legally responsible for Ellis' discriminatory discharge from employment – not the state. *Cooper v. State of Tennessee*, 106 S.W.3d 688, 691 (Tenn. Ct. App. 2003) (so holding), *perm. app. denied*. Accordingly, in the alternative to reversal, the Court should vacate the decision of the court of appeals and certify the unsettled question of whether Ellis was a county or state employee to the Supreme Court of Tennessee.

CONCLUSION

Ellis respectfully requests that the Court summarily reverse the judgment of the court of appeals or grant a writ of certiorari to review it. Alternatively, Ellis requests that the Court certify the unsettled question of state law that the court of appeals decided itself to the Supreme Court of Tennessee.

Respectfully submitted,

DOUGLAS B. JANNEY III
(BPR No. 19112)
2002 Richard Jones Road
Suite B-200
Nashville, Tennessee 37215
(615) 742-5900

Attorney for Petitioner
David Ellis